

1 **TRANSCRIBED FROM DIGITAL RECORDING**

2 IN THE UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ILLINOIS
4 EASTERN DIVISION

5 B. BROWN MEDICAL INC.,)
6 Plaintiff,)
7 vs.) No. 11 C 6007
8 CAREFUSION 303, INC. and HOSPIRA,)
9 INC.,) Chicago, Illinois
10 Defendant.) April 5, 2012
11) 9:45 A.M.

12 TRANSCRIPT OF PROCEEDINGS - Motion
13 BEFORE THE HONORABLE SUSAN E. COX, Magistrate Judge

14 APPEARANCES:

15 For the Plaintiff: NIRO, SCAVONE, HALLER & NIRO, LTD.
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18 BY: MR. RAYMOND PARDO NIRO, JR.

19 For Defendant Carefusion: McANDREWS HELD & MALLOY, P.C.
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22 BY: MR. CHRISTOPHER MICHAEL SCHARFF
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25 353 North Clark Street
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BY: MR. MICHAEL SKOPETS

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30 **NOTE: Please notify of correct speaker identification.**
31 **FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS**
32 **UNINTELLIGIBLE.**

1 (Proceedings held in open court:)

2 THE CLERK: 11 C 6007, B. Braun versus Carefusion.

3 THE COURT: Good morning.

4 MR. SCHARFF: Good morning, your Honor. Christopher
5 Scharff from the McAndrews firm on behalf of defendant
6 Carefusion 303.

7 And with me is my colleague Brianne Straka.

8 MS. STRAKA: Good morning.

9 THE COURT: Good morning.

10 MR. NIRO: Good morning, your Honor. Raymond Niro,
11 Jr., on behalf of B. Braun.

12 THE COURT: Good morning.

13 MR. SKOPETS: Michael Skopets for Hospira.

14 THE COURT: Okay. A couple of things. As I
15 understand it from reviewing the motion and the response, you
16 guys proposed a discovery schedule to Judge Gottschall that was
17 agreed to. Correct?

18 MR. NIRO: Right.

19 THE COURT: But it was never entered?

20 MR. NIRO: It has not been entered as of yet, that's
21 correct.

22 THE COURT: Okay. And how long ago did you do that?
23 I mean, was it at the beginning of the case as --

24 MR. NIRO: It was in the -- it was in January, I
25 believe.

1 THE COURT: Okay. And is that --

2 MR. NIRO: But it tracks the local patent rules.

3 THE COURT: Right. Is that still the schedule that
4 you want to follow?

5 MR. NIRO: It is.

6 THE COURT: Well, then I will enter it. So at least
7 we have that done. Okay?

8 MR. NIRO: Thank you, your Honor.

9 THE COURT: I think that was just -- it might have
10 been because none of the motions came in, and maybe -- maybe it
11 was just -- she just overlooked it.

12 But I'm happy to enter that. So that takes care of
13 that. So we will enter -- whatever the docket entry is, we'll
14 enter that schedule. I mean, there is no reason not to
15 file -- follow the local patent rules in this case. And it is
16 agreed.

17 So then we're down to sort of the motion. And why
18 don't you both -- I read what you filed. And it sounded to me
19 like this isn't so much about actual objections but sequencing.

20 MR. NIRO: It is the (unintelligible) unfortunately to
21 involve your Honor in -- it is more the timing of the
22 responses. The requests were served January 31st. We're more
23 than two months out now.

24 And we just want a date when defendant Carefusion --

25 THE COURT: Will --

1 MR. NIRO: -- will comply with Rule 33(d) and identify
2 specifically --

3 THE COURT: Okay.

4 MR. NIRO: -- what documents they -- they are relying
5 on.

6 I mean, 33(d) is pretty unique in that it has to be
7 documents from which we can ascertain the answer as easily as
8 they can.

9 THE COURT: Uh-huh.

10 MR. NIRO: So I assume when you answer an
11 interrogatory that way, you at least have the documents in
12 front of you --

13 THE COURT: No, you do have to do that.

14 MR. NIRO: -- or have access to them.

15 THE COURT: If you choose to answer them that way --

16 MR. NIRO: Right.

17 THE COURT: -- correct.

18 MR. NIRO: And so I don't think it should be more
19 than, you know, two weeks from today, three weeks from today in
20 which they comply with Rule 33(d) and answer with specificity
21 which documents they rely on. Or they can just give
22 substantive answers to the interrogatory.

23 THE COURT: And is there a reason why that can't
24 happen?

25 MR. SCHARFF: Yes, your Honor. I can explain in a

1 little bit more detail.

2 First of all, as your Honor may have seen from the
3 appearances last week, my firm was just retained a little over
4 a week ago --

5 THE COURT: Uh-huh.

6 MR. SCHARFF: -- to take over representation. One of
7 the first things that we did after being retained is to contact
8 Braun's counsel on Monday.

9 THE COURT: Uh-huh.

10 MR. SCHARFF: And we actually had what we thought was
11 a very productive phone call.

12 THE COURT: Uh-huh.

13 MR. SCHARFF: We agreed both to a date certain for
14 starting our production, and we agreed that (unintelligible) we
15 would be able to give them (unintelligible) volume of documents
16 in three weeks, and then also a date certain for substantially
17 completing all of our document production in three months.

18 On Tuesday all --

19 THE COURT: Why do you need three months to produce
20 documents in this case?

21 MR. SCHARFF: Well, your Honor, there is --

22 THE COURT: And wasn't it incumbent upon your client
23 to seek a protective order if that's the case?

24 MR. SCHARFF: Well, your Honor, normally -- normally
25 in large patent cases we have -- we're talking about six

1 patents in suit, a --

2 THE COURT: I do a lot of patent cases.

3 MR. SCHARFF: Yeah.

4 THE COURT: I know they are complicated.

5 MR. SCHARFF: Yeah. We're talking hundreds of
6 thousands, if not over a million pages, of documents.

7 THE COURT: Right. But the rules are pretty clear.
8 And I know this isn't -- I know you're new to the case. You
9 know, if you have a -- if there is an issue with discovery --

10 MR. SCHARFF: Uh-huh.

11 THE COURT: -- you know, the thing to do is not to
12 just not answer, it is to -- you have an affirmative obligation
13 to come in and tell the Court why you can't comply --

14 MR. SCHARFF: Uh-huh.

15 THE COURT: -- with the rules which set -- which stage
16 out when discovery is due. You can't just, you know what -- no
17 matter how complicated it is --

18 MR. SCHARFF: Yeah, I -- I agree with you. And, you
19 know, we would have -- you know, we can orally make a motion
20 for protective order now.

21 Our point is that we actually had come to a reasonable
22 time frame for getting them our documents that was agreed to on
23 Monday.

24 Then on Tuesday all that we had left to do was to file
25 a stipulation to remove this hearing from the calendar.

1 THE COURT: Uh-huh.

2 MR. SCHARFF: But Braun's counsel reneged and instead
3 has insisted on a few conditions that are the real sticking
4 points.

5 First of all, they have asked for two months, instead
6 of three months, for wrapping up the discovery. That's
7 probably still doable. Our main issue was that Braun wants
8 that to be a hard and fast cutoff, after which we would not be
9 allowed to supplement at all. Well, Rule 26(e) contemplates
10 and permits supplementation.

11 You know, here we have a close of initial discovery in
12 October. We're not trying to play games here, your Honor.
13 We -- we will perform a good faith search and produce
14 everything that we have within that time frame. But there may
15 be follow-up discussions with Braun's counsel, documents
16 uncovered in depositions, a very small trickle of documents
17 that we may have to produce, you know, up to the close of
18 discovery. And we think that that's reasonable.

19 The second --

20 THE COURT: What do you mean up to the close of
21 discovery? I mean, if --

22 MR. SCHARFF: Well, if --

23 THE COURT: -- if -- you're right, I mean, sometimes
24 things evolve in such a way that documents don't get produced
25 till later. But if depositions have been taken about subject

1 matters and you haven't produced a document --

2 MR. SCHARFF: Uh-huh.

3 THE COURT: -- and then they have to redepose
4 somebody, that's going be on your bill, not theirs.

5 MR. SCHARFF: Yeah. Yeah, we're --

6 THE COURT: That's the problem with --

7 MR. SCHARFF: Yeah, we're talk --

8 THE COURT: -- with things trickling in --

9 MR. SCHARFF: Right.

10 THE COURT: -- because everything else -- you know,
11 you guys always want to see everything before you take
12 depositions --

13 MR. SCHARFF: Uh-huh.

14 THE COURT: -- or substantially everything. And so --

15 MR. SCHARFF: Sure.

16 THE COURT: -- I don't want any -- either side to be
17 penalized by late production.

18 MR. SCHARFF: Uh-huh.

19 THE COURT: You would have to then agree we have to
20 reopen that deposition to allow a particular deponent to talk
21 about whatever it is that wasn't produced that, you know, was
22 in your possession, including (unintelligible).

23 MR. NIRO: And that was our concern, Judge, is what
24 they were talking about is two months out from now, which is
25 four months from the date our requests were served, they would

1 substantially complete their production. Well, what does that
2 mean? And we start taking depositions, and then documents are
3 produced right before the deposition or after. I mean,
4 substantially complete is not good enough. We need a
5 certification that after a thorough and complete and good faith
6 search they have produced all responsive --

7 THE COURT: Well, they have to cer- --

8 MR. NIRO: -- non-privileged documents.

9 THE COURT: Well, they have to certify it -- to your
10 point, you have to certify it regardless.

11 MR. SCHARFF: Right.

12 THE COURT: And you have to verify it regardless.

13 MR. SCHARFF: Yes. And, your Honor, that --

14 MR. NIRO: That's what we're asking for.

15 MR. SCHARFF: And that we agreed to. We agreed that
16 we would perform a good faith diligent search and produce
17 everything.

18 What we're talking about is, you know, if -- if
19 Mr. Niro says, well, you know, what about some other document?
20 And this document that wasn't uncovered during our original
21 good faith reasonable search what we're talking about is we
22 don't want to have a two-month deadline, after which any
23 document we may find after that is completely barred from the
24 case.

25 THE COURT: It is not that it is barred from the case,

1 but you will have -- I mean, your duty is to produce responsive
2 documents.

3 MR. SCHARFF: Uh-huh.

4 THE COURT: So if there is something that you don't
5 produce, which you really could have produced --

6 MR. SCHARFF: Uh-huh.

7 THE COURT: -- the burden is going to be on you to
8 tell me --

9 MR. SCHARFF: Yeah.

10 THE COURT: -- why it is you can't find it the first
11 time. If it is a result of them -- you saying, okay, we
12 understood you meant this --

13 MR. SCHARFF: Uh-huh.

14 THE COURT: -- now we understand you mean that, you
15 know, those things happen --

16 MR. SCHARFF: Okay.

17 THE COURT: -- in complicated litigation.

18 What I don't want to see happen is, you know, you
19 produce some stuff now, and then most of the stuff gets
20 produced after the fact.

21 MR. SCHARFF: Yeah.

22 THE COURT: Basically we have wasted a lot of time
23 taking depositions that we don't have a full record on.

24 MR. SCHARFF: Yeah.

25 THE COURT: So -- and I think two months should be

1 fine --

2 MR. SCHARFF: Uh-huh.

3 THE COURT: -- because you have had four months.

4 MR. SCHARFF: Sure.

5 THE COURT: And it is -- and that's a long time to
6 respond, even in a big case.

7 MR. SCHARFF: Yeah, and we -- as we told Braun's
8 counsel we anticipate giving them a very significant volume in
9 just three weeks. As soon as we were retained, we immediately
10 begun reviewing these documents and get additional documents
11 from the client. I mean, we really are not sitting on our
12 hands here.

13 And we completely agree that, yes, we -- we're not
14 trying to play games and say they (unintelligible) give us 60
15 percent of our documents in two months. We will give
16 everything that we find, you know, pursuant to that reasonable
17 good faith search.

18 MR. NIRO: If two months from now they can give us
19 that certification, that's -- we have no objection.

20 THE COURT: All right. Well, that's great.

21 MR. NIRO: For the document production, on the 33(d),
22 I think that should happen earlier because they should already
23 have an idea of what they were relying on when they cited
24 33(d) --

25 THE COURT: That's true.

1 MR. NIRO: -- in the first place.

2 MR. SCHARFF: Well --

3 MR. NIRO: So I would suggest two weeks, three weeks
4 for the 33(d). And if the full document production in response
5 to all of our requests, which is document requests which is
6 broader than interrogatories --

7 THE COURT: Right.

8 MR. NIRO: -- that can -- that can take two months.

9 THE COURT: Yeah, your client had to have read them
10 and decided the best way to answer it is based on information
11 in their possession --

12 MR. SCHARFF: Uh-huh.

13 THE COURT: -- at the time. Otherwise they shouldn't
14 have answered the interrogatory that way.

15 MR. SCHARFF: Yeah.

16 THE COURT: (Unintelligible).

17 MR. SCHARFF: I have a couple of responses to that,
18 your Honor. First of all, on Tuesday Mr. Niro had represented
19 that he would give us a month. This -- the two or three weeks
20 now is new.

21 Second of all, I think a lot of the concern is coming
22 from the fact that Carefusion, in its initial interrogatory
23 responses, had relied heavily on 33(d).

24 THE COURT: Right, which is a way of not answering the
25 question.

1 MR. SCHARFF: Yeah.

2 MR. NIRO: Right.

3 MR. SCHARFF: And as we told Mr. Niro, we are going to
4 be supplementing shortly to actually give substantive real
5 answers to his questions, dates, facts. We're going to be
6 removing a lot of the reliance on Rule 33(d).

7 THE COURT: Uh-huh.

8 MR. SCHARFF: There are still a couple of
9 interrogatories though -- for example, there is one that asks
10 us to identify every communication that Carefusion has had with
11 anyone regarding any time regarding its patents. We think it
12 makes a lot more sense to have that identification be done
13 commensurate with the completion of the discovery so that we're
14 just doing it once. Otherwise we're having to redo all --
15 review all the --

16 THE COURT: You know, the problem with
17 everything -- everything you say makes perfect sense. But this
18 is why you come to a Court and you move for protective order.
19 You're four months down the road, and basically it is like
20 we're starting over here.

21 MR. NIRO: Yes.

22 THE COURT: And that -- and I have to say that -- that
23 doesn't strike me as completely fair to the other side. And I
24 -- again, these weren't decisions you made as counsel, and I
25 totally understand that. I'm not -- this is not personal.

1 But, you know, we got to get things moving along here.

2 MR. SCHARFF: I completely agree and understand.

3 THE COURT: I mean, I wouldn't --

4 MR. SCHARFF: We're doing the best we can.

5 THE COURT: -- have briefed this -- personally --

6 MR. SCHARFF: Yeah.

7 THE COURT: -- and, you know, since you're going to be
8 with me now, I don't brief motions to compel unless there is a
9 legal issue. You file a motion to compel, we have a hearing,
10 and then I decide if there is something that you will need to
11 brief.

12 But, you know, this -- this kind of stuff is stuff we
13 can deal with orally. So you can start saving your client some
14 money going forward.

15 MR. SCHARFF: Okay.

16 THE COURT: Answer the interrogatories in three
17 weeks --

18 MR. SCHARFF: Okay.

19 THE COURT: -- under verification.

20 MR. SCHARFF: Okay.

21 THE COURT: If you are relying on documents and you
22 need additional time to produce those documents, you can at
23 least identify what they are.

24 MR. SCHARFF: Okay.

25 THE COURT: Okay? That way it is two months for the

1 documents, three weeks for the verified interrogatory answers.
2 You do your diligence search.

3 Everybody understands here -- and there is a
4 transcript running -- that if for some reason something isn't
5 produced within that two-month -- which is actually a four-
6 month period -- the burden will be on you to explain to the
7 Court why it is it wasn't --

8 MR. SCHARFF: Okay.

9 THE COURT: -- if it has some prejudice to plaintiff.
10 If it doesn't --

11 MR. SCHARFF: Okay.

12 THE COURT: -- then who cares?

13 MR. NIRO: We won't even object if it --

14 THE COURT: You know, if there is --

15 MR. NIRO: If there is no prejudice and it was
16 something that they --

17 THE COURT: But if there is a deponent who, you know,
18 for some reason they really thought they would have liked to
19 have shown them that document, well, then that's probably going
20 to be on your dime.

21 MR. SCHARFF: Uh-huh.

22 THE COURT: I mean, that's the best way to deal with
23 that.

24 MR. NIRO: That's fine.

25 THE COURT: But there are things that happen --

1 MR. SCHARFF: Uh-huh.

2 THE COURT: -- in cases -- you know, especially cases
3 involving lots of different things. But -- but, I mean, I'm
4 not going to say -- you know, we're not going to have an
5 absolute bar here.

6 Okay. So that's two months -- two months, three weeks
7 under the terms outlined in open court. The schedule will be
8 entered.

9 When do you want to come back?

10 MR. NIRO: Well --

11 THE COURT: And have there been any settlement
12 discussions?

13 MR. NIRO: There was a settlement meeting between the
14 principals without attorneys, which sometimes is the best way
15 to --

16 THE COURT: Especially in these cases, no offense.

17 MR. NIRO: -- do that if you get the lawyers out of
18 the mix.

19 THE COURT: Yeah.

20 MR. NIRO: But it was not successful. So at this
21 time --

22 THE COURT: What kind of pumps are these infusers?
23 What are they?

24 MR. SCHARFF: Well, they are -- they are the
25 electronic bedside unit that pumps medication slowly over time

1 to the patient.

2 THE COURT: Okay. There is no Baxter Healthcare
3 involvement in this at all, is there?

4 MR. SCHARFF: No.

5 THE COURT: Okay. In any way, shape or form?

6 MR. SCHARFF: No, nothing.

7 THE COURT: Okay. Because every time I hear medical
8 infusion, my husband works as a corporate counsel at Baxter, so
9 I want to just make sure that at some point they are not going
10 to be involved in this case or brought into this case in any
11 way.

12 MR. SCHARFF: No.

13 THE COURT: Okay. Good.

14 All right.

15 MR. SCHARFF: Your Honor, we did have one final thing
16 to raise.

17 THE COURT: Sure.

18 MR. SCHARFF: And it may be a bit premature.

19 Carefusion did serve its own document requests to Braun a
20 little bit later than Braun served their document requests.

21 THE COURT: Uh-huh.

22 MR. SCHARFF: But one concern that we have is that
23 Braun doesn't insist on Carefusion, you know, producing its
24 documents so quickly. But yet Braun then takes till after
25 (unintelligible) to produce its own documents.

1 THE COURT: Well, you have a right to file the motion
2 too. I have got one motion --

3 MR. NIRO: The responses aren't even due yet to the
4 Court, so --

5 THE COURT: You know, I mean, just -- you know, I
6 would expect to -- given the amount of time that they have
7 waited for their documents, that you would be at least
8 reasonable with respect to any extension they might require on
9 production of their own documents.

10 MR. SCHARFF: Yes. Absolute --

11 THE COURT: A reasonable extension.

12 MR. SCHARFF: Absolutely, your Honor. But at the same
13 time, you know, since they have been insisting on getting our
14 documents, you know --

15 THE COURT: Actually they haven't.

16 MR. SCHARFF: Four months --

17 THE COURT: They haven't really insisted until
18 recently.

19 MR. NIRO: We (unintelligible) four months.

20 THE COURT: Four months.

21 MR. SCHARFF: Well, but also to give you some
22 background, they may -- moved to compel two weeks after our
23 objections -- less than two weeks -- eleven days after our
24 objections were due, insisting on us producing all of our
25 documents essentially immediately. Where normally the parties

1 are able to work out mutually, if it is given that, you know,
2 they are going to have hundreds of thousands of pages of
3 documents to produce, a mutual plan that works for both
4 parties, especially --

5 THE COURT: Well --

6 MR. SCHARFF: -- given that discovery doesn't close
7 until October.

8 THE COURT: Right. But that will be here before you
9 know it. In my world October is right around the corner.
10 Probably in yours as well. I mean, it sounds like a long time,
11 but, you know, it is not. I'm already scheduling things well
12 into July and August (unintelligible) like this.

13 So, you know, everybody -- I hope you work well
14 together. It will make everyone's life a lot happier and
15 nicer, especially mine.

16 But, you know, I deal with the -- your points -- your
17 point has been raised. He has heard it. I have heard it. I
18 hope you're all reasonable. But this was the only motion to
19 compel here, and that's what I have ruled on.

20 MR. SCHARFF: Okay.

21 THE COURT: Okay.

22 MR. NIRO: Thank you, your Honor.

23 THE COURT: All right.

24 MR. SCHARFF: Thank you, Judge.

25 MR. SKOPETS: Thank you, your Honor.

1 THE COURT: Did I tell you -- give you a date?

2 MR. NIRO: Oh, the next date.

3 THE COURT: Yeah. What do you think?

4 MR. NIRO: I don't know what kind of timetable your
5 Honor --

6 THE COURT: Well --

7 MR. NIRO: -- four weeks --

8 THE COURT: -- I think -- I think probably -- I think
9 I probably should check in with you -- let's see. I'll see you
10 in the first part of May.

11 Vernita, give them a date the week of May 7th --

12 THE CLERK: Okay.

13 THE COURT: -- towards the end of the week.

14 And I will -- if you --

15 THE CLERK: (Unintelligible) okay?

16 THE COURT: Yeah.

17 And if you have any issues with respect to the
18 interrogatory answers, which you should have by then, you can
19 notice that motion up for that day so we can deal with it.
20 Hopefully that won't be necessary.

21 And then -- you know, and then we'll schedule -- we'll
22 probably do another one -- we'll schedule that date for that,
23 and then we'll see where we go.

24 But you should already know this, Mr. Niro. I don't
25 know that I have had you guys before. If you do -- if you do

1 reach an impasse on discovery, I want you to sit down
2 together. Buy each other a cup of coffee. That's not required
3 under my rule. But a face-to-face meeting is before you file a
4 motion to compel.

5 MR. SCHARFF: Okay.

6 THE COURT: Try to work it out.

7 If you can't, I have no problem doing motions to
8 compel. If I did, I would be in the wrong job. So, you know,
9 I'm happy to deal with them. But I like you to make a good
10 faith effort to work it out.

11 And all of these things work -- to be worked out --

12 MR. NIRO: We'll do that, your Honor.

13 THE COURT: -- including -- how many depositions do
14 you think you guys are going to be taking before the claim
15 construction?

16 MR. SCHARFF: I'm not sure. I know -- I think we have
17 a limit of ten.

18 THE COURT: Uh-huh.

19 MR. SCHARFF: I'm not entirely sure.

20 THE COURT: Okay.

21 MR. NIRO: It is too early to say.

22 THE COURT: Okay. All right. Well, you know, try to
23 be reasonable with respect to those things as well. Okay?

24 MR. NIRO: Absolutely.

25 MR. SCHARFF: Absolutely.

1 THE COURT: Welcome to the case.

2 MR. SCHARFF: Thank you.

3 THE COURT: And I will see you in a few weeks.

4 MR. NIRO: May 10th. Is it 9:30?

5 THE COURT: 9:30, yeah.

6 MR. NIRO: Okay.

7 THE COURT: Thank you.

8 MR. NIRO: Thank you, Judge.

9 (Which concluded the proceedings in the above-entitled
10 matter.)

11 CERTIFICATE

12 I HEREBY CERTIFY that the foregoing is a true, correct
13 and complete transcript of the proceedings had at the hearing
14 of the aforementioned cause on the day and date hereof.

15

16 /s/Pamela S. Warren
17 Official Court Reporter
18 United States District Court
Northern District of Illinois
Eastern Division

April 12, 2012
Date

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